United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

UNITED STATES COURT OF APPEALS
For The Second Circuit

MAY 9 1977

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VINCENT RIZZO,
Appellant,

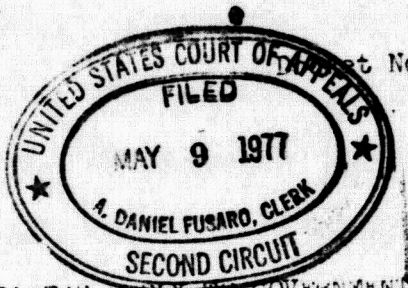
-v-

UNITED STATES OF AMERICA
Appellee.

****

77-1036

Docket No. 77-1036



APPELLANT'S REPLY TO GOVERNMENT'S BRIEF

The appellant, VINCENT RIZZO, pro se, and for his reply to appellee's brief, states:

This memorandum is filed in reply to the Government's brief to this Court. However, appellant apologizes to the Court for the submission of such a lengthy reply, for it is not my intention to undaly burden the Court, but rather to present an argument, as comprehensive as possible, in support of this appellant's claim. Therefore:

In appellee's Preliminary Statement - on page two of the brief, an apparent incorrectness in its statement can be found in which it describes the present dispositions of appellant's co-defendants. This error lies in the fact that two of the co-defendants (Patty Marino and Hyman Grant) were declared fugitives - according to the Docket Entry and the Court Records. Yet, appellee states that their part in this Indictment was nolle prosequi. Moreover, on page three, another error is found in that appellant never requested - as stated in the brief - that after entering guilty pleas to certain counts of the three Indictments that for sentencing in all three cases be referred to one judge. The fact is, that during appellant's first guilty plea, on that day (October 9,1973) he stated to the district court, it was his impression that he would submit guilty pleas in all three Indict-

ments to one judge. This, was denied by the district court. However, the district court - in Indictment 72 Cr. 1332 - did rule that the proper procedure would be to sentence the appellant on all three Indictments after his submission of guilty pleas in the different courts, on that same day (October 9,1973). Further, appellant did motion Judge Bryan, during the hearing on December 29,1976, that Judge MacMahon should conduct a hearing concerning the Indictment (73 Cr. 672) in which Judge MacMahon accepted the guilty plea. This was denied by Judge Bryan.

According to appellee's Statement of Facts, on page four: An addition is placed in what Mr. Epstein stated on the record, in that appellant was fully familar with the charges and the penalties involved. The fact is, there was no specific discussion concerning Count One and Count Three, nor in that matter, with any of the counts in the Indictment, because to begin with, appellant refused to plead guilty to Count Three, therefore, negating any statement by Mr. Epstein that the appellant was advised by counsel, as to the charges he agreed to plead guilty to. Moreover, no where in the pleading minutes does Mr. Epstein state that he discussed Count Eight with the appellant. Count Eight only surfaced at the "eleventh hour", when the appellant refused to plead guilty to Count Three; after hearing the district court describe the conduct in which appellant was charged with, which the appellant immediately denied, therefore, subsequently, forcing the Government to pick another count for the appellant to plead guilty - which was Count Eight. Thus, the appellee does not establish that the appellant knew, nor was told, at the time of the pleading the necessary elements to be a part of the conspiracy. The appellee simply relies on a naked statement: "Of knowingly knowing about stolen securities, dealing in stolen securities." However, according to the

plea minutes, appellant's only knowledge of someone dealing in stolen securities surfaced via a conversation with the two Government witnesses, while in Germany, thus restricting appellant's knowledge of the conspiracy to merely the conversations of the two Germans. Although appelle implies that an understanding of the charges was established by the district court, in that appellant was charged with possession of articles , things contained in packages, bags, and mail which had been stolen, however the appellant refused to plead guilty to Count Three, which encompassed similar accusations, as in Count One - the conspiracy, therefore, it was never established that appellant understood the specifics in the conspiracy. On the other hand, appellant stated that he knew they were involved in some sort of conspiracy i.e., that the Germans were, based upon a conversation with them while in Germany.

On page six, the appellee asserts that the district court establish· that a full unstanding as to the nature of the conspiracy was reached. However, a close reading of the pleading minutes will reveal that when the plea was taken, Judge MacMahon, in the first couple of pages does not read, nor thereafter, read the Indictment, but simply paraphases it to the defendant, but however does question the defendant as to, "Do you know what you are charged with?" Not asking the defendant, "What did you do?" But asking the defendant "Do you know what you are charged with?" The defendant, answering the questions, "Yes, sir, "Yes, "Yes." but not admitting any facts not giving the essential elements to satisfy a factual basis. On page three, of the plea minutes, the defendant stated to the Judge on Line seventeen, that, "I read it (the indictment) twenty times and I tried to see where I fit in." Accordingly, we have at the very outset a protestation possibly of innocence by the defendant. We do not have an admission of any of the overt acts, any

of the paragraphs or introductory remarks that are in the Indictment. Judge MacMahon failed to follow the standards that were set down by Rule 11, in the existing cases, in not explaining the law of conspiracy to the defendant, not eliciting from the defendant what he did to show whether the defendant knew of a conspiracy encompassing an illegal venture, nor, in fact, became part of it, albeit to knowing via hearsay, that some sort of conspiracy might have been in progress. There was no questioning, by the court, to show that Rizzo had any intent to enter an illegal conspiracy or whether or not he knew of any of the allegations that are attributed to the co-defendants. All we have is mere knowledge without participation in a criminal conspiracy, which is not in and of itself a crime.

Again, on page nine of the appellee's brief, a presumption is reached in that, after the district court inquired as to what threats, what evidence, what "bad things" did the defendant say to establish an extortion. Mr. Aronwald, the Government prosecutor, simply stated, in essence, that Rizzo instruted Benjamin to tell the Germans that Rizzo was merely a messenger boy and representing some very bad people in New York and that he had to come back from Germany with $200,000 or there would be trouble. Subsequently, upon the district court's inquiry, if this was substantially true, the defendant said yes, but however, went further to explain that instead of being a messenger boy, he was an errand boy, and again asserting that he did not know whether the stock was counterfeit or good. The defendant went on to say that the only problem that could be anticipated, in the event he went back to America with no money, would be focused on Rizzo. No one else.

The appellee seems to rely heavily on German wiretapping, pursuant to German authority, although never questioning as to its constitutionality,

nor its actual contents. Moreover, as to the district court's inquiry if indeed the defendant knew what he was doing, the defendant simply stated: "I did it. I told Mr. Benjamin to call them up and explain to them because maybe I was not getting through to them." Again, the court inquired if the defendant did "it" deliberately and intentionally. The defendant said, "Yes." However, a careful reading of the context of this particular exchange will reveal that all that was intended by the defendant was to merely urge Mr. Benjamin to explain to the Germans that he was in fact, only in Germany to collect his money - for money that was loaned to the Germans.

The appellee's Argument lacks substance, in that it conjures as to the appellant's intention to why he proceeded in bringing this action under Rule 32(d) F.R.C.P., instead of 28 U.S.C. §2255. The fact is that appellant that appellant was able to institute an action under Rule 32(d) only after vacating of sentence, in order to allow the district court more latitude towards withdrawing the guilty plea. Furthermore, although appellant received a suspended sentence, this fact should play no part in the adminstration of justice because a conviction for a crime that, perhaps, a person is innocent of, is undeniably a manifest injustice.

The record of the plea did not establish a voluntary plea because a guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." 394 U.S. at 466, the judge, in order to comply with Rule 11, must not only inquire into the defendant's understanding of the nature of the charges and the consequences of the plea, but must develope, on the record, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge. See: Santobello v. New York, 404 U.S. 257, 261 (1971)

In appellee's footnote, on page 19, of the brief, it is highly

conjecturable in assuming that appellant waited several years to institute a claim that in fact he did not understand, at the time of pleading, to what he was doing. The fact remains, appellant initiated litigation on his guilty pleas in November of 1974, involving the guilty plea entered on case 72 Cr. 1333 which subsequently was reversed and remanded to the district court by the Appeals Court - in May of 1975. Thereafter, nine months of litigation ensued. Eventually, 72 Cr. 1333 was nolle proseque. Then, began litigating case 72 Cr. 1332, and 73 Cr. 672 - presently before this Court. Because of the magnitude in litigating three cases, involving guilty pleas submitted in different courts - on the same day (October 9,1973), it took appellant, who is pro se, several years to be able to explain this possible manifest injustice in writ ing. The fact remains, since commencement of this action involving the Three Indictments, one remains, the one before this Court. The other two were both nolle proseque, after the court's declaring that the pleas in those cases were invalid.

It is interesting to note that appellant's counsel, during the three pleadings was Mr. Epstein who asserted in every instant that he explained the Indictments (72 Cr. 1332, 1333, and 73 Cr. 672) to the appellant. Yet, a careful analysis would have revealed, after reading the plea minutes, that this was not so. Two cases were reversed because, in essence the defendant did not understand the charges, nor were they properly explained to him. Accordingly, this case is surely divested of any explanation as to Count Eight ever being explained to the defendant by Mr. Epstein, before entering the plea.

Appellant respectfully avers to this Honorable Court that, after a careful reading of the pleading minutes, the minutes of the hearing, held on December 29,1976, before the Honorable Van Pelt Bryan, USDJ, and the

context of appellant's brief, a most comprehensice story will unfold, illustrating that the relief sought by appellant is justified.

WHEREFORE, appellant prays that the relief he has requested in his appeal be granted.

Respectfully submitted,

Vincent J. Rizzo

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ATTESTATION OF SERVICE

I, VINCENT RIZZO, swear under penalty of perjury that after receiving the Government's Brief, on May 3,1977, I perfected this above Reply, to the best of my recollection, and with the material on-hand concerning the law and the facts of the case - involving the appeal.
Further, I have placed in the U.S.Mail Box, a true copy of this Reply, addressed to the office of: Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, One St. Andrew's Plaza, New York, N.Y. 10007. And, furthermore, I have placed in the U.S.Mail Box, in the same mail box at the United States Medical Center for Federal Prisoners, Springfield, Missouri, nine copies which includes the original, to : The United States Court of Appeals, for the Second Circuit, U.S.Courthouse, Foley Square, New York, N.Y. 10007, on this day of the 5 of May, 1977.

Vincent J. Rizzo

VINCENT J. RIZZO #77336

Dated: 5/5/77

(witness) Frank X. Puglisse